

PHIL 30260 Philosophy of Law

Module Co-ordinator and Lecturer: Dr. Christopher Cowley (e-mail: christopher.cowley@ucd.ie)

Introduction.

This module will concern the philosophy of *criminal* law. The central philosophical concept is that of moral responsibility. What does it mean to be responsible, to be held responsible, to take responsibility, and to deny responsibility? When the police arrest a suspect, and the judge tries a defendant, they ask: did she do it (the so-called *actus reus*)? If she did, in what spirit did she do it – intentionally or recklessly, or was it an honest mistake (the so-called *mens rea*)? And if she did it intentionally, does she have an excuse or a justification (a ‘defence’) for what she did? Ultimately the trial is attempting to determine the precise degree of guilt (‘culpability’), and this will allow it to punish the defendant appropriately (or to acquit her).

Generally, we will focus on examples and legislation from English criminal law, with only occasional references to Ireland. This is because there is so much more academic scholarship about the English law, and because Irish criminal law mostly follows English anyway. Occasionally we will make comparisons between English and Irish, and indeed comparisons with other jurisdictions, e.g. the American Model Penal Code or ‘MPC’ – but only when it is relevant to the philosophical issues. You are not going to be tested on the law.

Note and warning.

This is a philosophy module, not a law module or a criminology module. (Criminology combines sociology and psychology, with a lot of empirical data). Importantly, this is not a module in Jurisprudence (sometimes called ‘Philosophy of Law’), which is about the nature of law in general and about the way that rules work. Our emphasis is less on the detail of the substantive law and institutions and more on a philosophical exploration of legal concepts (e.g. responsibility, justice) and/or an ethical critique of existing laws and institutions.

Some students (maybe 20% of the class) will have taken some law before, and this may be an advantage (or a distraction!). However, I have designed the module for students with no background in the law, and I am not expecting students to become legal experts by the end. Some of the philosophy will be difficult, and it is best if you have successfully completed at least four second-year modules in philosophy. Without that background, you will need to work harder to catch up. Law students should be careful not to write essays about what the law *is*; instead, they should concentrate on what the law *means* and/or on what the law *should be* (and why).

Week by week outline

1	Tue 22 Sept	<p>Introduction</p> <ul style="list-style-type: none"> • Module structure & assessment. • Important: the ‘must-pass’ policy. (see details at the end of this outline) • Summary of topics covered in the module. • Introduction to the broad topic of <u>responsibility</u>. What does it mean to <i>be</i> responsible? To be co-responsible? To <i>hold</i> someone responsible? to <i>deny</i> responsibility? <p>Background reading</p> <ul style="list-style-type: none"> • On-line Stanford Encyclopedia of philosophy (henceforth ‘<i>Stanford</i>’): ‘Moral responsibility’, ‘Theories of criminal law’
	Thu 24 Sept	<p>Introduction to criminal law, the legal system, and legal terminology in the UK and Ireland</p>
2	29 Sept + 1 Oct	<p>Topic 1: Intention and recklessness</p> <p>There is broad understanding of what it means to act <i>intentionally</i>, as opposed to accidentally. But even when I act accidentally, I can be culpable for failing to anticipate the risk of harming others, based on shared reasonable understandings of danger and vulnerability.</p> <p>So if I am driving, and I recognise my arch enemy, and I intentionally run her over, then that’s murder. But if I’m a boy racer and I drive too quickly and carelessly (i.e. recklessly) then when I kill a pedestrian, I cannot avoid blame (punishment) by declaring that it was merely an accident.</p> <ul style="list-style-type: none"> • Introduction to ‘<i>mens rea</i>’ (the different culpable mental states) • Distinction between conduct crimes, result crimes, and circumstance crimes • The role of beliefs, desires, purposes, calculations, motives • Direct and indirect intention (doctrine of ‘double effect’) • Conditional intention (“I will only do X in the case of Y”) • Objective risk and subjective assessment of risk. • The unfairness of ‘moral luck’: two equally reckless drivers, one is lucky and makes it home safely; the other kills a pedestrian. Same <i>mens rea</i>, but the latter has <i>done</i> something much more serious. Moral luck will be a theme through the whole module. <p>Reading:</p> <ul style="list-style-type: none"> • [primary] Duff A. (2008) ‘Whose luck is it anyway?’ in: Clarkson and Cunningham (eds.) <i>Criminal Liability for Non-Aggressive Death</i>, Ashgate. • Mitchell B. (2008) ‘Minding the gap in unlawful and dangerous act manslaughter: a moral defence for one punch killers’ in: <i>Journal of Criminal Law</i> vol. 72(6) • Irish Law Reform Commission (2008) <i>Homicide: Murder and Involuntary Manslaughter</i>. • Stanford: ‘Intention’, ‘action’, ‘moral luck’.
3	6+8 Oct <i>Tutorials begin this week</i>	<p>Topic 2: Negligence and omissions</p> <ul style="list-style-type: none"> • Failure to notice/know/check the things that one ought to notice/know/check (especially pertaining to an institutional role). But if something genuinely did not occur to me (even if it should) then there is nothing ‘wicked’ in my mind at the moment of negligence or omission.

		<ul style="list-style-type: none"> • One answer: what is wrong is a culpable indifference to the legally-protected interests of others. • Philosophical problem: can an omission <i>cause</i> bad consequences? • Again the unfairness of moral luck: two doctors who are equally negligent for a few minutes; the negligence of only one of them results in the death of the patient. (See the case of <i>Adomako</i> 1993.) <p>Reading:</p> <ul style="list-style-type: none"> • [primary] Smith A. (2017) ‘Unconscious omissions, reasonable expectations, and responsibility’ in: Nelkin & Rickless (eds.) <i>Ethics and Law of Omissions</i>, OUP. • Williams and Curnow (1996) ‘Death under anaesthetic: the case of Dr. Adomako’ in: <i>Medicine, Science and the Law</i>, vol. 36(3). • Stanford: ‘moral luck’, ‘causation in the law’, ‘weakness of will’, ‘the epistemic condition in moral responsibility’.
4	13+15 Oct	<p>Topic 3: Inchoate offences</p> <p>These are offences characterised by failure to carry out the planned crime.</p> <ul style="list-style-type: none"> • <i>Attempt</i>. Problem: if I attempt murder and fail, and nobody gets hurt – indeed the intended victim never finds out – that what exactly am I guilty of? This sounds like a ‘thought crime’. And: how far do I have to go in my attempt to be guilty? • <i>Incitement</i>. Again, I incite (encourage, persuade) someone to commit a crime, but I fail, maybe because she did not understand or receive my message, or because she was simply not persuaded. • <i>Conspiracy</i>. This could be called ‘attempted complicity’. As above, there is a question of how much I need to <i>know</i> and how much I need to <i>intend</i> in order to be culpable. • <i>Possession</i> (esp. drugs, burglary tools, forgery equipment, terrorist materials), i.e. regardless of whether you actually go on to use the things. <p>Readings:</p> <ul style="list-style-type: none"> • [primary] Jaconelli J. (2018) ‘Incitement: a study in language crime’ in: <i>Criminal Law and Philosophy</i> vol. 12. • Hanna J. (2007) ‘Getting Lucky, Getting Even, or Getting Away with (Attempted) Murder: The Punishment of Failed Attempts’ in: <i>Public Affairs Quarterly</i>, Vol. 21, No. 2. • Stanford: ‘shared agency’, ‘terrorism’
5	20+22 Oct	<p>Topic 4: Complicity</p> <p>A <i>principal</i> commits a crime and is straightforwardly guilty. A <i>secondary</i> assists or encourages the principal to commit that particular crime. Questions:</p> <ul style="list-style-type: none"> • How guilty is the secondary? What is her guilt based on? (Terminology: if a ‘secondary’ is guilty, she becomes an ‘accomplice’ / accessory.) • How much does the secondary need to <i>know</i> about the planned crime in order to be guilty? How much does she have to <i>endorse</i> it? • How much of a <i>causal</i> contribution does the secondary need to make in order to be guilty? Does the causal contribution need to be necessary for the principal crime to take place? • Should an accomplice be punished to the same degree as the principal? <p>Reading:</p>

		<ul style="list-style-type: none"> French P. (2016) ‘Complicity: That Moral Monster, Troubling Matters’ in: <i>Criminal Law and Philosophy</i> vol. 10.3. [This is the primary text. It comprises a response to the L&G 2013 book below.] Lepora and Goodin (2013) <i>On Complicity and Compromise</i>, OUP, Ch. 6 [this is a chapter from the book, with a summary of the authors’ position] Lepora and Goodin (2016) ‘Response to French’ in: <i>Criminal Law and Philosophy</i> vol. 10.3. [this is a response by the book authors to French’s critique] Stanford: ‘shared agency’, ‘collective responsibility’, ‘collective intentionality’
6		Reading week: no lectures, no tutorials
7	3+5 Nov	<p>Topic 5: Sexual offences and the problem of consent</p> <ul style="list-style-type: none"> Consent: definition, role, scope. Non-consent as a circumstance that turns lawful activity into unlawful. The possible roles of physical force, non-physical coercion and deception Misogynistic assumptions in law and in legal practice The ‘strict liability’ offence of statutory rape. The UK Sexual Offences Act 2003, especially sections 74, 75, 76 on consent. <p>Reading: [you should read all three texts, they are not long]</p> <ul style="list-style-type: none"> Herring J (2005) ‘Mistaken sex’ in: <i>Criminal Law Review</i> vol. 7. Gross H (2007) ‘Rape, moralism, and human rights’ in: <i>Criminal Law Review</i> vol. 3. [response to Herring] Herring J (2005) ‘Human Rights and Rape: A Reply to Hyman Gross’ in: <i>Criminal Law Review</i> vol. 3 [response to Gross] Stanford: ‘Feminist perspectives on rape’, ‘informed consent’
8	10+12 Nov	<p>Topic 6: Domestic violence</p> <ul style="list-style-type: none"> The problem of defining domestic violence and abuse. Differentiating the physical from the psychological, the emotional, the financial. The problem of privacy – in gathering evidence, in understanding the context. The question of aggravation. An assault is aggravated by the presence of racist motivation; should the same thing happen with the domestic circumstances? The concept of ‘coercive control’ in recent UK law, which may not involve physical harm. <p>Reading:</p> <ul style="list-style-type: none"> [primary] Isaacs T. (2001) ‘Domestic violence and hate crimes: acknowledging two levels of responsibility’ in: <i>Criminal Justice Ethics</i> vol. 20.2. Walklate and Fitz-Gibbon (2019) ‘The Criminalisation of Coercive Control: The Power of Law?’ in: <i>International Journal for Crime, Justice and Social Democracy</i> 8(4). Stanford: ‘Feminist philosophy of law’, ‘Marriage and domestic partnership’, ‘privacy’
9	17+19 Nov	<p>Topic 7: Defences I: duress and the excuse/justification divide</p> <p>The defendant admits that she intentionally committed the offence, but she offers an excuse – she was not fully responsible – and thereby hopes for lenience. The main excuses are provocation (loss of control), diminished responsibility and insanity. Duress is sometimes <i>called</i> an excuse, but also has unique properties.</p>

		<p>The classic example of duress is the bank robber. She points a gun at the teller, and the teller gives her the bank's money. Normally the teller would be charged with assisting the robbery, but she has a reasonable fear of suffering a greater harm than the bank's loss.</p> <p>Reading</p> <ul style="list-style-type: none"> • Baron M. (2014) 'Culpability, Excuse, and the 'Ill Will' Condition' in: Proceedings of the Aristotelian Society, Supplementary Volumes, Vol. 88. • Rosen G. (2014) 'Culpability, duress and excuses' in: Proceedings of the Aristotelian Society, Supplementary Volumes, Vol. 88. [note: although Baron is a response to Rosen, Baron is the primary text] • McColgan A. (1993) 'In defence of battered women who kill' in: <i>Oxford Journal of Legal Studies</i> vol. 13 no. 4. [I'll mention this briefly in the lectures, but am including it here mainly as a focus for possible essays.] • Stanford: 'autonomy', 'feminist perspectives on autonomy', 'moral responsibility', 'theories of criminal law'.
10	24+26 Nov <i>Last week of tutorials</i>	<p>Topic 8: Defences II: self-defence</p> <p>An aggressor A attacks an intended victim B (or B's relative or friend). Before A can strike a deadly blow, B intentionally kills A. At first glance this looks like straightforward murder (intentional killing): that is the 'narrow' description of the action. The 'wider' description is of B killing <i>A-in-order-to-defend-herself</i>. There are a number of conditions: the threat must be credible and imminent, and B's self-defence must be proportionate and a last resort. If successful, B will be justified and no criminal act has occurred. It is interesting to contrast the different roles of subjective beliefs in self-defence and duress.</p> <p>As the secondary reading, I include a famous medical case: the surgical separation of conjoined twins, resulting in the foreseeable death of the weaker twin. There were three different legal attempts to justify this. According to one, the doctors were 'defending' the stronger twin against the weaker.</p> <p>Readings:</p> <ul style="list-style-type: none"> • [primary] Bergelson V. (2016) 'Self-defense and risks' in: Coons & Weber (eds.) <i>The Ethics of Self-defense</i>, OUP. • Uniacke S. (2001) 'Was Mary's death murder?' in: <i>Medical Law Review</i> vol. 9. • Stanford: 'coercion', 'doctrine of double effect'
11	1+3 Dec	<p>Topic 9: Punishment and parole</p> <p>The most familiar kind of punishment is from the state. But every institution (e.g. UCD) also has forms of punishment at its disposal, and so do parents. A liberal state requires a 'theory of punishment' to justify deliberately imposing hardship (e.g. imprisonment) on a citizen. One theory ('retributivism') concerns what a criminal offender <i>deserves</i> – the offender deserves the punishment because of the harm that she freely and knowingly caused. (She incurs a 'debt' to society.) Another theory (consequentialism) uses punishment as a form of <i>deterrence</i> – the punishment is well-publicised, and that hopefully deters the individual from re-offending, and deters others from offending. Another form of consequentialism involves <i>rehabilitation</i> or <i>education</i>, so that the offender learns more pro-social behaviour.</p> <p>Once the serious offender has been properly sentenced in a fair trial, she begins a prison sentence, and this raises new questions. Is it fair for her to be released early on parole,</p>

		<p>and how can that early release be justified? Surely if a fair trial sentences her to X years in prison, then her punishment should be X years, not a day less? And yet, the promise of parole is an incentive for good behaviour in prison. And what if we can be sure that she has learned her lesson and is safe to release early?</p> <p>Reading:</p> <ul style="list-style-type: none">• Bell, K. (2020) 'Toward A Normative Theory of Parole Grounded in Trust' (draft)• Stanford: 'punishment', 'legal punishment', 'retributive justice', 'forgiveness'
--	--	--